Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 83-1615

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

MOTION AND MEMORANDUM SUGGESTING THAT CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI BE DEFERRED

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MOTION AND MEMORANDUM SUGGESTING THAT CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI BE DEFERRED

The Petitioner in the above-entitled case files this memorandum to suggest that the Court postpone a decision on his Petition for a Writ of Certiorari pending disposition of his motion to reopen and/or reconsider his deportation order filed with the Board of Immigration Appeals. See Exhibit "A" attached hereto and incorporated by this reference; see also, Murray v. City of New York, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720; Winkler and Smith Co. v. Sunkist Growers, Inc., 370 U.S. 19; Keney v. New York, 388 U.S. 440.

The questions which Petitioner seeks to raise herein are twofold:

(1) Whether the offenses for which he was convicted in Ireland -- the design and manufacture of weapons as a member of and solely for the Irish Republican Army --, and his subsequent escape from prison, are "political offsenses" within the meaing of 8 U.S.C. Sections 1182(a)(9) and (10), which therefore should not serve as the basis for denial of discretionary relief under the Immigration and Nationality Act, and

(2) Whether Petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed government "harrassment" and "intimidation."

At the time of the close of the administrative record in this case Respondent was not in possession of any evidence concerning the recusal of Immigration Judge Ernest Hupp other than the Judge's statements made in his recusal order. Since then Respondent has obtained a handful of INS and other government documents under a Freedom of Information Act request. The great majority of documents sought concerning the recusal of Judge Hupp have not yet been produced for inspection and Petitioner has initiated an action under the Freedom of Information entitled O'Rourke, et a. v. Department of Justice, et al. No. 83-Civ-5142-RJW (Southern District of New York).

Based on the douments already received under the FOIA, Petitioner has filed a motion to reopen and/or reconsider with the Board of Immigration Appeals. Exhibit A, supra. Documents obtained under the FOIA and copies of recent letters received from members of Congress indicate that:

1. INS had no reasonable basis for following Judge Ernest Hupp for approximately 5 hours on May 22, 1981;

2. The INS agents -- in a black sedan and wearing civilian clothes -- followed Judge Hupp in a manner designed to insure that he knew he was being followed;

3. INS agents actively evaded local police contacted by Judge Hupp for "protection";

4. Respondent's case files were removed from Judge Hupp's desk by INS agents before he filed a formal motion recusing himself from the case;

5. Judge Hupp intended to grant Petitioner's applications for discretionary relief from deportation;

6. Judge Hupp feared for his life and his wife's life because of the incident in which he was followed home by INS agents (Judge Hupp thought he was being "stalked by assassins" according to a Secret Service memorandum obtained under the FOIA);

7. INS agents claim that they followed Judge Hupp because of an "anonymous" written tip -- never produced -- that he was leaving work early without authorization;

8. Judge Hupp withdrew from Petitioner's deportation case -- immediately before rendering a decision -- before being advised by the government that he was followed by INS agents, not IRA supporters or members;

9. Judge Hupp believes that INS not only "intimidated" and "harrassed" him off the case, but also that INS subsequently engaged in a "cover-up" of the entire operation;

10. Documents obtained under the FOIA indicate that INS had prejudged Petitioner's case, that his attorney-client relationship might have been penetrated, and that INS agents falsely informed members of the public -- in writing -- that Petitioner had killed law enforcement officers in Ireland.

Petitioner requests that this Court postpone a decision on his pending Petition for a Writ of Certiorari until such time as the Board of Immigration Appeals has ruled on his motion to reopen and/or reconsider based upon the new evidence obtained relevant to the unfairness of his initial deportation hearing. In the event that the Board of Immigration Appeals reopens Petitioner's deportation hearing, his Petition for a Writ of Certiorari might become moot.

Dated: June 7, 1984

Respectfully submitted

Peter A. Schey
Counsel for Petitioner

BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

IN THE MATTER OF:	)	A22 607 396
	)	
	)	MOTION TO REOPEN
MICHAEL O'ROURKE	)	AND/OR RECONSIDER
	)	

I

INTRODUCTION

Pursuant to 8 C.F.R. Section 3.2, Respondent Michael O'Rourke brings this motion to reopen and/or reconsider the decision rendered by this Board on May 24, 1983, dismissing his appeal from a decision of Immigration Judge Lyons, dated July 12, 1982.

The regulations and precedent decisions thereunder recognize the right of the Board of Immigration Appeals to reopen and/or reconsider its decisions on application of the Respondent.

Respondent also respectfully requests that a stay of deportation issue pending the issuance of a decision on this motion for reopening and/or reconsideration.

The motion to reopen is made on the basis of new evidence obtained by Respondent which was not previously available to him and which is material to the issue of government misconduct during his initial deportation hearing. The motion to reconsider seeks further consideration by this Board of its initial decision that government misconduct during Respondent's deportation hearing is

irrelevant in light of this Board's de novo review of the Immigration Judge's decision.

The new documents submitted herewith establishes prima facie evidence that:

1. Immigration Judge Ernest Hupp engaged in no wrong-doing giving rise to his being followed by a black sedan automobile containing INS agents in plainclothes for a number of hours after leaving the Immigration Court on May 22, 1982;

2. Judge Hupp was followed in a manner meant to insure that he would be aware of the fact that he was being followed and thereby to intimidate and frighten him;

3. The INS agents following Judge Hupp actively alluded local police who he contacted for protection;

4. Judge Hupp immediately advised INS that he believed that he was followed by IRA supporters who might have targetted him for assassination, and required medical treatment following the incident;

5. Despite an immediate investigation into the matter, including the involvement of the FBI, INS did not advise Judge Hupp that INS rather than the IRA had followed him until the day he entered a formal recusal notice in the administrative file, which was after he already considered himself recused and had infgormed INS of his recusal;

6. Judge Hupp did intend to rule in favor of Michael O'Rourke, and had given indication of his intention;

7. INS engaged in a "cover-up" of their activities in this incident;

8. Had Judge Hupp been immediately or timely notified that it

was INS and not the IRA which had followed him, he would not have recused himself from the O'Rourke case.

9. INS has engaged in a concerted campaign to publicly spread malicious and false information about Michael O'Rourke;

10. Either INS or some other enforcement agency working in conjunction with INS might have penetrated Respondent's attorney-client relationship.

Respondent has suffered no criminal convictions in the United States and is currently not a defendant in any criminal proceedings.

If significant government misconduct was involved in causing Judge Hupp's recusal, Respondent did not receive a fair deportation hearing as required by the Fifth Amendment's due process clause. Under such circumstances remedial action should be taken by this Board, including possible remand for a new deportation hearing. Under no circumstances can the due process clause (or the integrity and independence of Immigration Court) allow that a hearing in which the INS intimidates an Immigration Judge off a case simply continue in front of a new Immigration Judge.

II

Procedural Posture of the Case

On October 30, 1979, Respondent Michael O'Rourke was arrested by agents of INS. An Order To Show Cause dated October 30, 1979, alleged that Respondent was a native and citizen of the Republic of Ireland and that he had "failed to show the time, place and

manner of entry into the United States." On November 29, 1979, INS lodged an aditional charge that Respondent had entered the United States without inspection in violation of 8 U.S.C. Section 1251(a)(2).

At a hearing held on June 17, 1980, Respondent testified regarding his name, place and date of birth, and use of a passport in the name of Patrick Mannion to obtain a visitors visa to come to the United States. The INS lodged an additional charge of deportability, 8 U.S.C. Section 1251(a)(2), based on Respondent's overstay of his non-immigrant visa. A further charge of deportability was entered alleging that Respondent had failed to comply with former 8 U.S.C. Section 1305, by failing to register with INS after his arrival in the United States.

Based on Respondent's testimony, Immigration Judge Ernest Hupp found that he had violated INA Section 241(a)(2), 8 U.S.C. Section 1251(a)(2) by overstaying his visa. The Judge found that there was insufficient evidence to sustain a charge under Section 241(a)(5), 8 U.S.C. Section 1251(a)(5) (failure to register).

On May 20, 1981, the hearing reconvened before Judge Hupp. Based on the approval of an immediate relative petition filed by Respondent's wife, Respondent applied for adjustment of status under 8 U.S.C. Section 1255. Respondent also submitted applications for waivers under INA Sections 212(h) and 212(i), because of his possible excludability under Section 212(a)(9) and (10) based on his Irish criminal convictions, and under Section 212(a)(19) because of the possible materiality of his misrepresentations in obtaining a visa.

Respondent testified extensively about his IRA activities in

Ireland, his arrest and conviction there, and his subsequent escape from custody and flight to the United States.

At the end of 1971 Respondent joined the IRA and went through a military-political training program. In 1972, he began working full time as an IRA engineer. Respondent explained that the material manufactured at the factory that he supervised was destined for Northern Ireland and had a twofold prupose: primarily "for use against the British forces," and secondarily to be used in the event of a British declaration of intent to withdraw to "protect Catholics in the Catholic areas to control the leaders of the loyalists." (Emphasis added). Respondent testified: "I did not know the specific targets."

Immigration Judge Hupp sought to end the Government's repeated questioning about the targets by stating:

> I think the respondent's answer that he was involved in fabricating bombs and didn't know where they were used and [the government's suggestion that] they might have been used on civilians is analogous [to the] situation where Americans used their energy to make bombs in World War II which were used to kill civilians of their enemies in Europe and elsewhere . . .

Respondent further elaborated on his understanding of the IRA policy concerning civilian casualities:

> Your Honor . . . there is an army record that a warning order is in force. It is a court martial offense if a warning has not been given.
> Irish Republican Army volunteers have been killed and captured going back in to take out charges that have been planted . . .

Respondent was never directly involved in the use of weapons or explosives. Respondent testified that after his arrest in Ireland, he was convicted in a Special Criminal Court used to try

IRA offenses. He was sentenced to six years in prison.

Respondent also testified about the circumstances surrounding his escape from prison. He explained that the escape was politically motivated and that he was "ordered" to participate by the IRA command.

Respondent further testified that the IRA encouraged him to leave Ireland in the wake of reports from his family and subsequently from a member of the IRA intelligence staff that his life was in danger: "that if I were killed it would solve a lot of questions."

After the hearing Judge Hupp asked Respondent where he would live if permitted to remain in the United States. The Judge also asked him about his prospects for employment in the United States. The Judge also advised him that after three years residence in the United States Respondent could "become a naturalized citizen . . ."

When the INS sought to introduce a report prepared by the Alcohol, Tobacco and Firearms Bureau, Department of Treasury, regarding the substances listed in Respondent's Irish conviction records, Judge Hupp indicated that this report was irrelevant to the adjustment application and declined to accept it into evidence: "I don't think that I have to go into that. It has no bearing on his eligibility to adjustment. We have belabored the point about the bombs and mortars and I see no point in belaboring it any further."

Judge Hupp stated that he felt that no additional evidence was needed regarding Respondent's activities and convictions in Ireland: "I have now heard enough of what happened in Ireland. I

am [now] interested in what happended in the United States." The Immigration Judge viewed the case as closed, other than allowing the INS to take two depositions of witnesses they offered to present and to send the transcripts to the Immigration Court.

The scenario presented at the end of the hearing on May 20, 1981, was greatly altered by unanticipated intervening events. As is described in detail in section III, infra, on May 22, 1981, two days after concluding Respondent's hearing, Judge Hupp was followed home for more than 120 miles by two INS agents in civilian clothes. For two weeks Judge Hupp was left to believe that IRA sympathizers -- possibly out to kill him -- were responsible for following him. Judge Hupp informed INS and the Chief Immigration Judge (the latter assumedly did not know who had actually followed Judge Hupp) that he was withdrawing from the case because of his fear for his and his wife's lives. INS waited until the morning of June 5, 1981, the morning Judge Hupp had scheduled to enter his recusal order, to advise him that he had not been followed by the IRA but by INS agents.

On June 29, 1981, the proceedings were reconvened before Immigration Judge F. Lyons who announced "I am taking jurisdiction." No inquiry was allowed into the matter of Judge Hupp's recusal. Judge Lyons stated -- without indicating how he knew this -- that the recusal of Judge Hupp "has absolutely nothing to do with this case." (Emphasis added).

While Respondent was denied any opportunity to review Judge Hupp's recusal during the course of his deportation hearing, the INS subsequently submitted declarations directly with the Board declaring that Judge Hupp's recusal was unrelated to the

Respondent's case. The agents actually involved in the following incident are never identified in the declarations. INS claims that Judge Hupp was followed home for approximately five hours because of an "anonymous" tip that he was leaving work early. This tip was allegedly received "on February 11, 1979," more than two years before he was followed home. An "investigator" was not assigned to the "Hupp" matter until February 1979, after the O'Rourke case was initiated. Judge Hupp was not followed home until two days after the Respondent's hearing had ended.

As Respondent argues below in seeking reconsideration, the incident which resulted in Judge Hupp's recusal should have, at a minimum, resulted in an examination of Judge Hupp's allegation that he was intentionally frightened off the case by INS agents afraid that he was about to rule in Respondent's favor. If Judge Hupp's assessment is correct, due process and Respondent's right to a fair hearing were clearly violated. Under such circumstances INS should not be allowed to simply sail forward with the hearing and a new Immigration Judge more inclined to rule in INS's favor. At a bare minimum, the Respondent's hearing should have started over again before a new Immigration Judge. Anything less simply rewards INS for potentially gross -- if not criminal -- misconduct.

On July 12, 1982, Judge Lyons issued his decision, not unexpectedly in favor of INS. This Board issued a decision on May 24, 1983, dismissing Respondent's appeal. On February 21, 1984, the Court of Appeals for the Second Circuit issued a decision denying Respondent's appeal. A stay of the order of deportation was granted to provide Respondent an opportunity to file a

Petition for Certiorari in the United States Supreme Court. That Petition was filed on April 2, 1984, and remains pending before the Court.

III

Review of New Evidence Justifying Reopening

Motions to reopen may be granted when the Respondent presents new evidence, material to an adjudication of his case, and not reasonably available at the time of the initial deportation hearing. Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. 1976). The Respondent must establish the prima facie materiality of the new evidence obtained and how it might change the outcome of the case. Matter of Garcia, 16 IN 653 (1978); Matter of Pattel, 16 IN 600 (1978).

This Board certainly has the discretionary power to remand a case to the Immigration Court for further proceedings and remedial action upon the finding of a prima facie showing of prejudicial government misconduct (see discussion infra). Respondent herein requests such a remand and suggests that the appropriate remedial action might involve anything from dismissal of the deportation proceedings to requiring that a new and complete hearing be held before an Immigration Judge. Even though this Board's review of deportation orders and applications for discretionary relief might be de novo in nature, it is also true that the Board has the power to remedy fundamentally unfair deportation proceedings, and might not have denied Respondent's applications for discretionary relief had Judge Hupp -- in the first instance -- granted such

applications.

On May 26, 1981, Judge Hupp wrote a memorandum to Doris Meissner, Acting Deputy Commissioner of INS, stating in relevant part:

> This report is written in order to bring to your attention what I call a very disturbing, frightening, upsetting act against me on Friday, May 22, 1981.
>
> It should be noted that I observed being followed by a black two-door . . . automobile with two white males in it . . . I observed this vehicle behind me as I turned west on Route 322 from Route 95 south and again noticed this same vehicle [behind me] south on Route 1 . . . At approximately 1:15p.m. we both [Hupp and another person] stopped for lunch . . . We then proceeded south on Route one until we turned west on a raod to Fork, Maryland which is a very narrow, winding raod and stopped for a few minutes near the Gunpowder State Park building to stretch our legs. After continuing on this raod we merged onto Belair Road in Baltimore, Maryland and traveled south on this road until turning right onto Route 695. I noticed when I turned on to Route 695 this same black two-door automobile with the same two men directly behind my car . . . I continued south on 695 and noted this same vehicle was still following me when I arrived at Route 3 turn-off south. I made a turn into the turn-off and noticed this same vehicle was still following me.
>
> I became very scared for my life because I felt these men may mean harm for me and may be sympathizers of the Irish Republican Army trying to intimidate me in reaching a decision on Michael O'Rourke . . .
>
> While proceeding south on Route 3, I decided to go into a Save-On gasoline station, north of the Millersville Police Station . . . I again observed this same car with the same men parked on an access road outside the gasoline station . . . Upon proceeding north I looked in my rear view mirror and again saw these men still following me . . . I turned [into] . . . McDonalds. They swerved then to make the righthand turn . . . [and] waited for me to come out. I decided then the next stop would be the police station . . .
>
> I drove . . . to the police station with this same vehicle still following me. I parked my car and went over and spoke to an Anne Arundel County police officer, identified myself and explained I stopped because a car had followed me on the way from Philadelphia and pointed the car out to him. At that moment, they realized they were being singled out and sped out of the police station road. I made a report at the Millersville Police Station and two plainclothes police detectives

> pursued the car . . . The officer at the desk called the local FBI office and said that an agent would interview me at my home.
>
> I then proceeded to my home and awaited the arrival of the FBI agent who upon arrival identified himself as John A. Friel, Jr. I related to him what had happened and that I was fearful for my life and fearful of my wife's life and fearful that my home could be bombed . . .
>
> I trust that all necessary and proper precautions and actions will be taken and this matter will be fully investigated and that I will be informed of the outcome. I have been to the office of my family physician . . . and am under his care at the present time.

See Exhibit A, attached hereto and incorporated by this reference. Copies of Judge Hupp's memorandum were sent to the Chief Immigration Judge, the FBI, and Lyle Karn, INS District Director in Philadelphia. Judge Hupp's memorandum was obtained by Respondent from INS through the Freedom of Information Act.

It can reasonably be concluded from Judge Hupp's memorandum that the persons following him made themselves quite obvious to him. They do not seem to have been involved in a clandestine investigation concerning when Judge Hupp left work (or whether he was leaving work early without authorization). If the "investigation" of Judge Hupp was initiated on the basis of an "anonymous" tip that he was leaving work early -- as claimed by INS -- it is unreasonable to assume that the "investigators" would follow Judge Hupp for over 120 miles after he left work. It should also be noted that INS has never produced the written anonymous tip which allegedly gave rise to the "investigation" of Judge Ernest Hupp.

It might also be noted that Judge Hupp stated in his formal recusal notice that the "anonymous" tip was completely false (if it existed at all), and that no action was ever taken against

Judge Hupp other than following him home for about five hours.

Counsel for Respondent has not been able to directly communicate with Judge Hupp because he has been ordered not to discuss the following incident under pain of "administrative action." However, Senator Arlen Specter recently spoke with Judge Hupp in relationship to a Congressional investigation into the following incident and Judge Hupp's subsequent recusal. According to Senator Specter, Judge Hupp told him that "the INS investigators based their following him on one anonymous hand-written letter and nothing more." See Exhibit B. Judge Hupp believes that the claim of an anonymous tip is an INS "cover up." Ibid.

Chief Judge Monsanto expressed "surprise" at the INS action "and said that any such matter should have been referred to" himself. Ibid.

Immediately after the following incident, and long before Judge Hupp entered his recusal order, he found that "the O'Rourke files had been removed from Judge Hupp's office by a clerk who reported to the District Director of INS, rather than any judicial officer." Ibid. (Emphasis added).

Congressman Borski advised Senator Specter "that Judge Hupp said he would have granted O'Rourke's request to stay in the United States." Ibid. (Emphasis added). Senator Specter asked Judge Hupp about his intended ruling and the Judge advised him "that based on the record before him there was nothing in the record to preclude Judge Hupp from giving O'Rourke an adjustment of status as a matter of administrative grace." (Emphasis added). Ibid.

In a letter addressed to Senator Alan Simpson, Chairman of the Senate Immigration Subcommittee, dated April 13, 1984, Senator Specter states that based upon his review of a partial Justice Department file shown to him on the matter of the Judge Hupp incident, "I continue to believe that a hearing should be held by the Judiciary Committee or a Subcommittee on the issue of the INS following of Judge Hupp and Judge Hupp's later recusal." See Exhibit C, attached hereto and incorporated by this reference.

A letter written by Congressman Robert Borski to Congressman Peter Rodino dated February 9, 1984, states in relevant part:

> Today I had a phone conversation with Judge Hupp.
> He told me that at the time he withdrew [from the Respondent's case], he was prepared to rule in Mr. O'Rourke's favor based on his marriage to an American citizen and the fact he hadn't committed any crimes in this country. He further said that [he believed] Mr. O'Rourke's actions in Ireland were political.
> He told me that he was forced off the case because he was prepared to rule in Mr. O'Rourke's favor. he believed that is why he was followed by the two INS agents.
> He further told me that he withdrew from the case before he knew that the two men following him were INS agents. At the time he withdrew he could not concieve that the men following him could be government agents because he was a judge . . .
> He said that he was absolutely intimidated by being followed. He said that at that time, John McCollough (a Philadelphia union official) had been killed in a bombing, and he was scared his life was in danger. He felt threatened . . .
> He said that he withdrew from the case believing that Mr. O'Rourke should not be deported.

See, Exhibit D, attached hereto and incorporated by this reference.

It may be reasonably assumed that Congressman Borski's letter accurately reflects his conversation with Immigration Judge Hupp. The letter establishes prima facie evidence that (1) Judge Hupp

intended to rule in favor of Respondent, (2) Judge Hupp withdrew from Respondent's case before being made aware that INS agents rather than IRA supporters followed him on May 22, 1981, (3) the following incident caused Judge Hupp to become fearful for his life, and (4) Judge Hupp believes that he was forced off Respondent's case because he was "prepared" to rule in Respondent's favor.

Suspicion about government misconduct in the Judge Hupp incident is heightened by the fact that various intelligence agencies were aware that Judge Hupp had concluded the hearing and only depositions remained to be taken in the case. For example, a Secret Service memorandum dated May 22, 1981, states that "depositions will be taken in Washington, D.C. during the first week in June 1981. Depositions will be taken for continuation of deportation proceedings against the subject." See, Exhibit E, attached hereto and incorporated by this reference. It is interesting to note that while Judge Hupp had indicated that the hearing had ended but for the depositions, the Secret Service (correctly) stated that the matter would be continued. Ibid.

An undated document obtained from the Secret Service under the Freedom of Information Act states that Judge Hupp "removed himself from a deportation case because he feared he was being stalked by assassins. But, government officials say he was actually followed by federal agents . . ." See, Exhibit F, attached hereto and incorporated by this reference. This memorandum establishes that Judge Hupp withdrew from Respondent's case before being informed that government agents -- rather than IRA supporters -- followed him on May 22, 1981. At the time Judge

Hupp withdrew, he thought he had been "stalked by assassins . . ." Ibid. If nothing else INS should have fully informed Judge Hupp about who really followed him before he "removed himself" from Respondent's case.

Documents received under the Freedom of Information Act from the U.S. Secret Service indicate direct involvement by their agency and the FBI in Respondent's case. The Secret Service has refused to disclose much of the information sought on Respondent's case. See e.g., Exhibits G and H, attached hereto and incorporated by this reference.

It should be noted that Respondent's Freedom of Information Act request resulted in the disclosure of only a handful of documents and each agency from which documents were sought -- including INS, the FBI and the Secret Service -- withheld numerous documents on the grounds of interfering with an on-going investigation, divulging the identity of confidential sources, and other exemptions under 5 U.S.C. Section 552(b). Respondent has filed a district court action in the District of New York entitled O'Rourke, et al. v. Department of Justice, et al., No. 83-Civ-5142(RJW), and anticipates the release of additional documents through this litigation.

(ii) Agency Prejudgment of Respondent's Case

Evidence of agency prejudgment of Respondent's case is provided in a memorandum dated February 11, 1980, written to the "SAIC Intelligence Division" stating: "[I]t is expected that [Respondent] . . . will atempt to claim 'asylum in the United States' . . . [INS] will fight O'Rourke's attempts on the 'asylum

issue' . . ." See Exhibit I, attached hereto and incorporated by this reference.

Another memorandum obtained under the Freedom of Information Act from the Secret Service dated February 12, 1980, states that "O'Rourke would request political asylum in the United States . . . [and] the government would contest any asylum request made by O'Rourke." See Exhibit J, attached hereto and incorporated by this reference. Clearly the United States Government had decided that it would contest Respondent's political asylum application long before it was ever filed with INS.

(iii) Penetration of Attorney-Client Relationship

A Secret Service memorandum dated November 30, 1979, obtained under the Freedom of Information Act, gives an indication that Respondent's attorney-client relationship may have been penetrated by Government agents so that they were aware of legal actions which he intended to take before actually taken. For example, the November 30, 1979, memorandum states: "O'Rourke's defense against deportation is currently based on the premise [that] the government arrest warrant is illegal. If this does not work, additional technicalities will be proposed to stall the deportation with claiming political asylum as the last resort." See Exhibit K, attached hereto and incorporated by this reference. The wording of this memorandum clearly suggests that Government agencies were aware of what Respondent intended to do before he had ever done it in his deportation hearing, and even what would be done as a "last resort."

A letter received by Respondent's counsel concerning his

Freedom of Information Act request made to the U.S. Secret Service states that certain information sought would not be released to protect "the identity of a confidential source . . ." See, Exhibit L, attached hereto and incorporated by this reference.

(iv) INS Publicizing Misinformation about Respondent

Through the Freedom of Information Act Respondent has also obtained a December 5, 1979, letter written by INS Assistant Commissioner for Investigations Glenn A. Bertness, addressed to Mr. Francis Cannon, falsely and maliciously stating, in part, that Respondent "is presently wanted by Irish authorities for escape from prison and for the subsequent murders of a British Ambassador and a police officer." See Exhibit M, attached hereto and incorporated by this reference. Testimony at Respondent's deportation hearing, including the tesimony of an Irish police officer called by INS, confirmed that Respondent is only wanted in Ireland to complete his original 6-year sentence and for his escape from prison. INS has at all times known that Respondent is not wanted in Ireland for any murders or other lesser acts of violence.

On March 16, 1983, INS Chief Legal Officer Richard J. Sharkey wrote a letter to James Delany falsely and maliciously stating, in part, that Respondent "killed a prison guard" in Ireland. See Exhibit N attached hereto and incorporated by this reference. INS knows that Respondent never killed a prison guard in Ireland.

IV.

INS Misconduct Should Result In Remedial Action

Respondent respectfully requests reopening and reconsideration on the basis that the documents he has recently come into possession of establish with sufficient credibility the possibility that gross government misconduct deprived him of a fair deportation hearing as required by the United States Constitution's Fifth Amendment due process clause. Yamataya v. Fisher, 189 U.S. 86 (1903); Ng Fung Ho v. White, 259 U.S. 276 (1922); Bridges v. Wixon, 362 U.S. 135 (1945); Sung v. McGrath, 339 U.S. 33 (1950); Accardi v. Shaughnessy, 347 U.S. 260 (1954). Upon the level of showing made in this case, where the Immigration Judge himself believes that he was intimidated off a case by INS agents, a Respondent should be entitled to an evidentiary hearing of some sort into the issue of possible government gross misconduct. In the event that such misconduct is found to have existed, some type of remedial action must be taken to preserve Respondent's right to a "fair" hearing. Perhaps such a remedy would involve recision of Judge Hupp's recusal, or the intiation of a new deportation hearing, or the dismissal of the Order to Show Cause (leaving INS free to reinitiate a new OSC). However, it is inconceivable that a federal agency could force an administrative law judge off a case by making him fear for his life and then simply sail forward to complete the hearing before a newly assigned judge! Under this approach had INS believed that Judge Lyons would rule in favor of Respondent, they could have simply frightened him off the case and got a third judge, and so on and so on. The Respondent's due process rights and the integrity of the Immigration Court must require something more

than a mere replacement of the removed judge.

The Board of Immigration Appeals and federal courts have repeatedly reversed deportation orders where serious government misconduct was shown. U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954); Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983); Lopex-Mendoza v. INS, 705 F.2d 1059 (9th Cir. 1973); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Cheung v. INS, 418 F.2d 460 (D.C. Cir. 1969): Matter of Garcia-Flores, Interim Decision No. 2780 (BIA 1980).

In Navia-Duran v. INS, supra, the Court of Appeals held that due process woiuld be violated were INS permitted to use a coerced statement as evidence to establish deportability. 568 F.2d at 810. The Court found a "picture . . . of an over-zealous immigration agent seeking to intimidate an alien in order to effectuate deportation without . . . procedural niceties . . ." 568 F.2d at 210. If intimidation of an alien by an INS agent requires reversal of the deportation order and a new hearing without the use of statements improperly obtained, certainly intimidation of the Immigration Judge must also invoke remedial action under the Fifth Amendment's due process clause.

Mr. Justice Brandeis noted that deportation often involves the loss of "all that makes life worth living . . ." Ng Fung Ho v. White, 259 U.S. 284 (1922). Deportation "visits a great hardship on the individual . . ." Bridges v. Wixon, 362 U.S. 135, 136 (1945). The Supreme Court has commanded that "[m]eticulous care must be exercised lest the procedure by which [the respondent] is deprived of [Fifth Amendment due process] liberty not meet the essential standards of fairness." 326 U.S. at 154.

This Board must set aside its inevitable prejudices about the nature of Respondent's activities as an engineer for the IRA, and objectively consider whether to allow the apparant INS gross interference with the integrity of the Immigration Court go unexamined and unremedied in this case. It is not Constitutionally sufficient to state that this Board's de novo review power (over the merits of Respondent's case) wipes out the government misconduct at hand.

Had Judge Ernest Hupp been immediately told that he was not being "stalked by assassins" but rather "followed" by INS agents, he would not have withdrawn from the case. Had Judge Hupp not recused himself from the case, he obviously intended to grant Respondent's applications for discretionary relief. It is also clear that Respondent has not been determined to be statutorily ineligible for relief from deportation; this Board's earlier decision makes clear that relief is denied on discretionary grounds.

Had Judge Hupp granted discretionary relief, this Board might well not have overruled that decision. See e.g., Matter of T, 7 IN 417 (BIA 1957); Finucane, Procedure Before the Board of Immigration Appeals, 31 Intel Rel. 30 (1954) (If the case presents an issue as to the credibility of witnesses, due onsideration is always given to the conclusions reached by the Special Inquiry Officer who had the witness before him . . ."") While the Board has the power to conduct a de novo review of the record, it will certainly take into account that the immigration judge is the primary trier of fact with a better opportunity to assess credibility, and "ordinarily will not alter his factual

determinations." Gordon and Rosenfield, Immigration Law and Procedure, Section 1.10(e), page 1-77 (1981). Where defects in proof or procedure are found to exist, the Board has remanded cases to remedy the deficieny. See e.g., Matter of P, 9 IN 368 (BIA 1961); See also, Tandaric v. Robinson, 257 F.2d 895 (7th Cir. 1958). The Board may direct that the deportation case be reopened "for a limited purpose, e.g., developing evidence on a specific issue." Immigration Law and Procedure, supra, at page 1-79. Or it may order that "a completely new hearing be conducted . . ." Ibid.

Respondent timely sought and continues to seek the opportunity to obtain and present evidence (including perhaps administrative discovery under 8 C.F.R. Section 287.4), and to cross-examine the government's affiants regarding the Judge Hupp incident.

The INS should not be permitted to rely on ex parte declarations proclaiming the absence of wrong-doing and submitted directly to the Board of Immigration Appeals following the close of the administrative record.

V.

Conclusion

For all of the reasons stated above, Respondent respectfully moves this Board for an Order reopening and reconsidering his deportation hearing and remanding the matter for further proceedings in accordance with the due process clause of the Fifth Amendment to the United States Constitution.

Dated: June 6, 1984

Respectfully Submitted,

Peter A. Schey

Peter A. Schey
Counsel for Respondent

Memorandum

RECEIVED
INS
1981 MAY 29 AM 11:45
DISTRICT OFFICE
PHILADELPHIA, PA.

Subject	Date
Report of Unusual Incident on May 22, 1981	May 26, 1981

To Doris Meissner
Acting Deputy Commissioner
Central Office

From Ernest H. Hupp
Immigration Judge
Philadelphia, Pa.

This report is written in order to bring to your attention what I call a very disturbing, frightening, upsetting act against me on Friday, May 22, 1981.

It should be noted that I observed being followed by a black two-door, possibly 1981, Cougar automobile with two white males in it. The driver was clean-shaven; the passenger had a dark moustache with a clean-shaven portion under his nose. I observed this vehicle behind me as I turned west on Route 322 from Route 95 south and again noticed this same vehicle with the same two passengers following me south on Route 1. It should be noted that I was following another vehicle driven by a friend of mine, Fred Florenz, Jr., from Baltimore, Maryland and was using his itinerary at his suggestion. At approximately 1:15 p.m. we both stopped for lunch at Perkey's Restaurant on an intersecting road which is on a route going to Lancaster, Pennsylvania, 31 miles to the north of where we ate. We then proceeded south on Route 1 until we turned west on a road to Fork, Maryland which is a very narrow, winding road and stopped for a few minutes near the Gunpowder State Park Building to stretch our legs. After continuing on this road, we merged onto Belair Road in Baltimore, Maryland and traveled south on this road until turning right on to Route 695. I noticed when I turned on to Route 695 this same black two-door automobile with the same two men directly behind my car while proceeding on 695 beltway. Mr. Florenz made a right-hand turn at the Charles Street exit. I continued south on 695 and noted this same vehicle was still following me when I arrived at Route 3 turn-off south. I made a turn into the turn-off and noticed this same vehicle was still following me.

I became very scared for my life because I felt these men may mean harm for me and may be sympathizers of the Irish Republican Army trying to intimidate me in reaching a decision on Michael O'Rourke (aka: Patrick Mannon). I am hearing this case in New York City having been there on Wednesday, May 20, 1981, leaving Prospect Park at 6 a.m. proceeding to New York City and returning that evening at 10:30 p.m.

SERVICE
MAY 29, 2 20
DISTRICT
OFFICE

Exhibit "A"

To	Act	Inf
DD		✓
DDD		
DEP		
IB		
RAI		
CHT		
TC		
TA		
IJ		
PHT		
FROM:		
DATE:		

While proceeding south on Route 3, I decided to go into a Save-On gasoline station, north of the Millersville Police Station, and fill my tank with gasoline. I again observed this same car with the same men parked on an access road outside of the gasoline station. I then decided not to proceed home but to go north on Route 3 to McDonald's, approximately ½ mile north of the gasoline station. Upon proceeding north I looked in my mirror and saw these men still following me on Old Mill Road. I turned to the right and then a quick left turning into McDonald's. They swerved then to make the righthand turn into a BP station, made a 360° turn and waited inside. The men waited for me to come out. I decided then the next stop would be the police station.

I drove on Old Mill Road, then on RT. 3 south ~~lane~~, and when I reached the turn-off into the police station I made a left and went to the police station with this same vehicle still following me. I parked my car and went over and spoke to an Anne Arundel County police officer, identified myself and explained I stopped because a car had followed me on the way from Philadelphia and pointed the car out to him. At that moment, they realized they were being singled out and sped out of the police station road. I made a report at the Millersville Police Station and two plainclothes police detectives pursued the car with a Pennsylvania tag on the rear bumper. The officer at the desk called the local FBI office and said that an agent would interview me at my home.

I then proceeded to my home and awaited the arrival of the FBI agent who upon arrival identified himself as John A. Friel, Jr. I related to him what had happened and that I was fearful of my life and fearful of my wife's life and fearful that my home could be bombed if these were in fact Irish Republican Army agents or sympathizers trying to influence my decision in the O'Rourke case. Special Agent Friel advised that teletypes would be sent to the Philadelphia and New York City offices relating this matter.

I do not feel that I can work in the U.S. Courthouse in Philadelphia until the O'Rourke case is decided because I feel that I would just be placing my person in jeopardy by going to Philadelphia where possible harm awaits me.

I trust that all necessary and proper precautions and actions will be taken and this matter will be fully investigated and that I will be informed of the outcome. I have been to the office of my family physician, Dr. Edward S. Kallins in Baltimore, and am under his care at the present time.

Ernest H. Huff

cc: Joseph W. Monsanto, Chief Immigration Judge
Lyle L. Karn, DD, PHI
FBI Agent John A. Friel, Jr.

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, D.C. 20510

March 30, 1984

The Honorable Strom Thurmond
United States Senate
Washington, D. C. 20510

Dear Strom:

Following the conversation among you, Senator Simpson and me yesterday, I called Judge Hupp and learned some things of importance which I want to call to your attention.

Judge Hupp said that the INS investigators based their following him on one anonymous hand-written letter and nothing more. Judge Hupp said that he thought that allegation sounded like a "cover up."

When the INS agents followed Judge Hupp from Philadelphia to Maryland, he was so frightened that he drove into a police station. At that point, the INS agents drove away in a hurry without identifying themselves when a policeman came upon the scene.

Judge Hupp further said that his supervisor, Judge Monsanto, expressed surprise at the INS action and said that any such matter should have been referred to Judge Monsanto.

The following occurred in May 1981 on the Friday before Memorial Day. Judge Hupp filed a Memorandum recusing himself the following Tuesday. When he returned to his office the next Monday (he took off the week because he was ill), all of the O'Rourke files had been removed from Judge Hupp's office by a clerk who reported to the District Director of INS, rather than any judicial officer.

Judge Hupp advised that there was never any hearing in the judicial proceedings on O'Rourke's claim that O'Rourke had been denied due process of law. There was no testimony before the Board of Immigration Appeals, and there was no lower court proceeding. Accordingly, there appears to have been no evidentiary base for the Second Circuit summary one sentence conclusion that "Petitioner's due process claims arising out of Judge Hupp's decision to recuse himself are so lacking in substance as to merit no discussion."

As I mentioned to you yesterday, Congressman Borski (in whose Congressional District Mrs. O'Rourke lives) told me that Judge Hupp said he would have granted O'Rourke's request to stay in the United States. I asked Judge Hupp about that, and he said that based on the record before him there was nothing

in the record to preclude Judge Hupp from giving O'Rourke an adjustment of status as a matter of administrative grace.

I am pursuing the matter by obtaining all of the records available from Senator Simpson and any other source where I can obtain any further factual information.

It is my request that the Committee proceed to have a hearing on the issue of Judge Hupp's recusal because:

1. The extraordinary event of INS agents following the Judge from Pennsylvania to Maryland based on one anonymous letter.

2. Judge Hupp's stated fear that he was about to be assassinated which led him to recuse himself.

3. The failure of the INS agents to identify themselves, but instead left the scene, after Judge Hupp found a policeman.

4. The extraordinarily fast removal of the O'Rourke papers from Judge Hupp's office by an INS clerk.

5. Judge Hupps' statement that he is not a golfer, that there was no reason for INS agents to suspect him of dereliction and Judge Hupp's characterization of the hand written anonymous letter as a "cover up."

While it is true that Mrs. O'Rourke is a constituent from Pennsylvania, it is my strong view that our Committee has a responsibility to look into this matter under our oversight function, especially in the context where the Department of Justice and INS have stonewalled my repeated efforts to get to the underlying facts.

Beyond our supervisory function, if INS follows a Judge on this state of the record, then the independence of the judiciary is being severely undermined and the Congress should legislate on this subject if a hearing confirms the findings of this very preliminary inquiry.

Sincerely,

Arlen Specter

AS:jb

cc: Senator Simpson

By Hand

ARLEN SPECTER
PENNSYLVANIA

Mary Louise
741

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, D.C. 20510

April 13, 1984

The Honorable Alan K. Simpson
United States Senate
Washington, D. C. 20510

Dear Alan:

As I had mentioned to you at the Judiciary Committee Executive session yesterday, I think it is useful to put in writing my renewed request for a hearing on the O'Rourke case and the reasons for this request based on the current status of the O'Rourke matter.

Immediately after our discussions two weeks ago, I had a two and one-half hour meeting with representatives of the Immigration and Naturalization Service and the Department of Justice and went over the INS file. I had asked INS for a few additional pieces of information, which they have not yet provided, but in any event, those outstanding items are not critical. My investigation has gone as far as it can go without a hearing, so I regard my investigation to be concluded.

Based on my review of the INS file, I continue to believe that a hearing should be held by the Judiciary Committee or a Subcommittee on the issue of the INS following of Judge Hupp and Judge Hupp's later recusal.

At the lengthy meeting, the Department of Justice was represented by Donald Baker, Esquire, and at that time I renewed my request for the Department of Justice file. For the past ten days, we have been trying to get an answer from the Department of Justice without success.

For about a year now, I have virtually made it a career to pursue Attorney General Smith and his Department, and a number of these requests have been on behalf of the Committee (after Senator Thurmond requested that I prepare specific interrogatories) and on behalf of the Subcommittee. I do not say this lightly, but frankly, it is my view that the Attorney General and the Department of Justice have been unprofessional and insulting in their handling of this entire matter in their refusals to respond and their dilatory tactics.

In my judgment, the hearing on the O'Rourke matter should include the summoning of Attorney General Smith to deal with the question of the Department of Justice's failure to respond to the long-standing requests for information by the Judiciary Committee and me on the O'Rourke case.

Sincerely,

Arlen Specter

AS:jb

cc: Senator Strom Thurmond
Attorney Genral Smith

Exhibit "C"

By Hand

ROBERT A. BORSKI
3D DISTRICT, PENNSYLVANIA

COMMITTEES:
MERCHANT MARINE AND FISHERIES
PUBLIC WORKS AND TRANSPORTATION
SELECT COMMITTEE ON AGING

Congress of the United States
House of Representatives
Washington, D.C.

PLEASE REPLY TO:
☐ 314 CANNON BUILDING
WASHINGTON, D.C. 20515
(202) 225-6251

☐ 303 BAYLIS TIMES BUILDING
8001 ROOSEVELT BOULEVARD
PHILADELPHIA, PENNSYLVANIA 19152
(215) 338-3356

☐ 3405 KENSINGTON AVENUE
PHILADELPHIA, PENNSYLVANIA 19134
(215) 423-6962

☐ 7208 NORTH BROAD STREET
PHILADELPHIA, PENNSYLVANIA 19126
(215) 424-6430

February 9, 1984

Hon. Peter Rodino, Jr.
Chairman
Committee on the Judiciary
2137 Rayburn HOB

Dear Mr. Chairman:

I am writing to bring to your attention some very important information regarding my introduction of a private bill for Michael O'Rourke.

As you know from the previous information I have forwarded to you, Immigration Judge Ernest H. Hupp was hearing the O'Rourke case and it appeared from the statements in the court record that he was favorably inclined towards Mr. O'Rourke. Two days later, he was followed by two men in a black car for 125 miles.

Today I had a phone conversation with Judge Hupp.

He told me that at the time he withdrew, he was prepared to rule in Michael O'Rourke's favor based on his marriage to an American citizen and the fact he hadn't committed any crimes in this country. He further said that Mr. O'Rourke's actions in Ireland were political.

He told me that he was forced off the case because he was prepared to rule in Mr. O'Rourke's favor. He believes that is why he was followed by the two INS agents.

He further told me that he withdrew from the case before he knew that the two men following him were INS agents. At the time he withdrew he could not conceive that the men following him could be government agents because he was a judge. He had served the government honorably for many years and had never seen such a thing.

He said that he was absolutely intimidated by being followed. He said that at that time, John McCollough (a Philadelphia union official) had been killed in a bombing, and he was scared his life was in danger. He felt threatened.

He told me that he had been through World War II and Korea and had not been as frightened then as he had been when he was followed.

When I told him that I had introduced a private bill, he said he was in favor of granting relief to Michael O'Rourke. He said he withdrew from the case believing Mr. O'Rourke should not be deported.

This information deserves to be considered by the Immigration Subcommittee at a hearing. That is why I need your help to request a stay should the court order Mr. O'Rourke deported within the next few days.

I am enclosing a copy of the letter that I received today from Chairman Mazzoli which says that the Subcommittee will place the bill on its agenda for consideration when all appeals are exhausted.

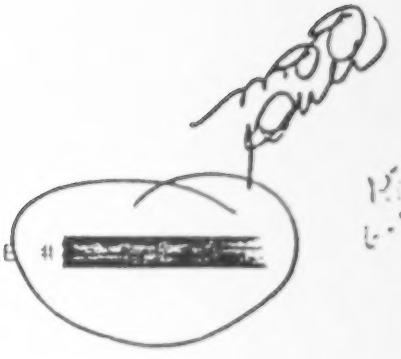
I thank you for your kind and prompt attention to this matter. If you have any questions, please do not hesitate to call me at any time.

Sincerely,

ROBERT A. BORSKI
Member of Congress

RAB:ec

(D (C



ZCZCNYC 1421EST 052281 USSSNS

ZNRUUTIHL ZZ

FM NEW YORK FIELD OFFICE FILE # [redacted]

TO HEADQUARTERS (SID/FIB)

INFO PHILADELPHIA FIELD OFFICE

SUBJECT MICHAEL ANTHONY O'ROURKE

A. INTRODUCTION:

REFERENCE IS MADE TO TWX #065 FROM NEW YORK TO INTELLIGENCE DIVISION, DATED 05/08/81, CONCERNING THE SUBJECT.

B. OTHER INVESTIGATION:

ON 05/20/81, CONTACT WAS MADE WITH METROPOLITAN CORRECTION CENTER (MCC), NEW YORK, CONCERNING THE SUBJECT. THE SUBJECT IS CURRENTLY CONFINED AT THAT FACILITY AWAITING DEPORTATION PROCEEDINGS.

ON 05/22/81, CONTACT WAS MADE WITH AUSA BELOTE, SDNY, WHO ADVISED THAT DEPOSITIONS WILL BE TAKEN IN WASHINGTON, D.C., DURING THE FIRST WEEK IN JUNE 1981. DEPOSITIONS WILL BE TAKEN FOR CONTINUATION OF DEPORTATION PROCEEDINGS AGAINST THE SUBJECT.

C. DISPOSITION:

CASE CONTINUED AT NEW YORK ON 30 DAY STATUS.

USSS NEW YORK [redacted]

Exhibit "E"

Best Copy Available

(NEW)

(NEW YORK CITY) -- A U-S IMMIGRATION COURT JUDGE FROM THE BALTIMORE AREA SAYS HE REMOVED HIMSELF FROM A DEPORTATION CASE BECAUSE HE FEARED HE WAS BEING STALKED BY ASSASINS. BUT, GOVERNMENT OFFICIALS SAY HE WAS ACTUALLY BEING FOLLOWED BY FEDERAL AGENTS.

JUDGE ERNEST HUPP SAYS THE CASE INVOLVED 28-YEAR-OLD MICHAEL O'ROURKE, A ONE-TIME BOMB SPECIALIST FOR THE I-R-A. A GOVERNMENT SPOKESMAN SAYS THE AGENTS WERE FOLLOWING JUDGE HUPP AS PART OF AN INVESTIGATION INTO A NON-CRIMINAL MATTER. BUT THE GOVERNMENT WOULD NOT ELABORATE.

Exhibit "P"

Best Copy Available

##PHL<

//IMMEDIATE//

FM HQS ID (FIB/EC)

TO PHILADELPHIA

79 NOV 1 AM : 49

FIB

SUBJECT: MICHAEL O'ROURKE

REFERENCE IS MADE TO USSS TELETYPE NUMBER 1433 DATED 10-31-79 CONCERNING THE CAPTIONED SUBJECT.

QUOTED BELOW FOR YOUR INFORMATION IS AN FBI TELETYPE RECEIVED ON 11-01-79 CONCERNING THIS SUBJECT.

QUOTE:

[redacted]

Best Copy Available

[redacted]

UNQUOTE

PHILADELPHIA IS REQUESTED TO CONTINUE THEIR INVESTIGATION

HQS ID (FIB/EC) [redacted]

662USS RECEIVED 0922EST 110179

Exhibit "G" - 2 of 2

Best Copy Available

F&B

CC SAIC
Rig'l

##PHL NYC<

//PRIORITY//

FM HEADQUARTERS (ID-FIB/EC)

FILE [redacted]

TO PHILADELPHIA
NEW YORK

SUBJECT: MICHAEL O'ROURKE

REFERENCE IS MADE TO PREVIOUS REPORTS CONCERNING THE CAPTIONED SUBJECT.

ON 12/28/79, THE FOLLOWING TELETYPE WAS RECEIVED FROM FBI AND IS QUOTED BELOW IN ITS ENTIRETY:

QUOTE

[redacted]

[redacted]

[redacted]

[redacted]

UNQUOTE

PHILADELPHIA AND NEW YORK ARE REQUESTED TO CONTINUE THEIR INVESTIGATIONS

HEADQUARTERS (ID-FIB/EC) [redacted]

012USS RECEIVED 1031EST 123179

UNITED STATES GOVERNMENT

memorandum

DATE: 02-11-80

REPLY TO ATTN OF: [redacted]

SUBJECT: Anthony Michael O'Rourke [redacted] File

2-11-80 gal (A)

TO: SAIC Intelligence Division

[redacted] New York, contacted writer and advised following re: captioned subject's latest judicial status:

AUSA Belote, New York, advised that the subject ap peared in court on 02-07-80. The subject reportedly informed judge that he is not the "subject in question." Because of this, AUSA Belote has asked for a continuance so that a "witness can be brought from Ireland, who will identify this subject."

AUSA Belote further advised SA [redacted] that it is expected that this subject, once identified by the Irish witness, will attempt to claim "asylum in the United States." Belote further advised that he will fight O'Rourke's attempts on the "asylum issue" and that this can be expected to continue in court.

Writer informed SA [redacted] at a report should be sent from NYFO detailing the above and that 30 day status should be requested until this is settled judiciously.

Exhibit "I"

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10 (REV. 7-76) GSA FPMR (41 CFR) 101-11.6 5010-112

848NYC 1529EST 021280 US6661

//ROUTINE// T (03-18-80)

FM NEW YORK [redacted] file

TO ID (FIB/EC)
PHILADELPHIA

SUBJECT: MICHAEL A. O'ROURKE

SYNOPSIS

THE SUBJECT'S DEPORTATION HEARING OF 2/7/80 WAS CONTINUED PENDING THE ARRIVAL OF A WITNESS FROM IRELAND THAT COULD MAKE A POSITIVE IDENTIFICATION OF THE DEFENDANT.

CASE CONTINUED IN NEW YORK.

A. INTRODUCTION

REFERENCE IS MADE TO THE PHILADELPHIA TWX # 375, DATED 2/8/80 AND THE TELEPHONE CONVERSATION BETWEEN S[redacted]ID) AND S[redacted](NYFO) ON 2/11/80.

D. OTHER INVESTIGATIONS

ON 2/11/80, AUSA THOMAS BELOTE, CIVIL DIVISION, SDNY, TELEPHONE NUMBER (212) 791-9166 ADVISED S[redacted]T O'ROURKE'S 2/7/80 DEPORTATION HEARING HAD BEEN CONTINUED. AUSA BELOTE CONTINUED THAT NO NEW HEARING DATE HAD BEEN SET.

AUSA BELOTE FURTHER STATED THAT THE GOVERNMENT WAS ATTEMPTING TO OBTAIN A WITNESS FROM IRELAND TO POSITIVELY IDENTIFY O'ROURKE AND REFUTE HIS INTENTION THAT HE WAS NOT IN FACT THE PERSON IN QUESTION.

AUSA BELOTE CONTINUED THAT HE BELIEVED, UPON POSITIVE IDENTIFICATION O'ROURKE WOULD REQUEST ASYLUM IN THE UNITED STATES. AUSA BELOTE STATED THAT THE GOVERNMENT WOULD CONTEST ANY ASYLUM REQUEST MADE BY O'ROURKE.

ON 2/11/80, S[redacted]) WAS TELEPHONICALLY ADVISED OF THE ABOVE FINDINGS BY S[redacted]YFO).

F. DISPOSITION

CASE CONTINUED IN NEW YORK WITH A THIRTY DAY REPORT STATUS

Exhibit "J"

79 NOV 30 A11 : 46

121PHL 1003EST 113079 USS755

//PRIORITY//

FM PHILADELPHIA FILE: [redacted]

TO HEADQUARTERS (ID-FIB)
NEW YORK

SUBJECT: MICHAEL O'ROURKE

(A) INTRODUCTION:

REFERENCE PHILADELPHIA TELETYPE NO. 087 OF 11/14/79.

(D) OTHER INVESTIGATION:

ON 11/29/79 THE SUBJECT HAD AN INS HEARING AT THE FEDERAL COURTHOUSE, PHILADELPHIA, PA. HE REFUSED TO ANSWER ANY PRELIMINARY QUESTIONS INCLUDING HIS NAME, CLAIMING IT WOULD INCRIMINATE HIM. O'ROURKE'S DEFENSE AGAINST DEPORTATION IS CURRENTLY BASED ON THE PREMISE THE GOVERNMENT ARREST WARRANT IS ILLEGAL. IF THIS DOES NOT WORK, ADDITIONAL TECHNICALITIES WILL BE PROPOSED TO STALL THE DEPORTATION WITH CLAIMING POLITICAL ASYLUM AS THE LAST RESORT.

THE INS HEARING WAS THEN POSTPONED UNTIL 12/6/79. O'ROURKE WAS RETURNED TO THE METROPOLITAN CORRECTION CENTER IN NEW YORK.

(F) DISPOSITION:

CONTINUED PENDING FURTHER INS HEARINGS.

PHILADELLPHIA [redacted]

Exhibit "K"

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

APR 26 1983

Mr. Peter A. Schey, Esq.
NCIR, Inc.
1544 West 8th Street
Los Angeles, CA. 90017

Re: Freedom of Information Act
O'Rourke - 7236

Dear Mr. Schey:

Reference is made to your letter received March 30, 1983, appealing a decision of Mr. Hugh P. Ward, Freedom of Information Officer, United States Secret Service, denying you certain information regarding your client Michael A. O'Rourke under the Freedom of Information Act. Treasury regulations regarding administrative appeals of initial denials by the United States Secret Service vest the review authority in the Deputy Director of the Secret Service (31 Code of Federal Regulations, Subtitle A, Part 1, Appendix D and 40 Federal Register 49089, dated October 21, 1975).

The records and correspondence pertinent to your appeal have been reviewed. I have determined that the exemptions claimed by Mr. Ward in his letter of March 16, 1983 were proper. The Secret Service records contain investigatory information compiled for law enforcement purposes. Pursuant to Title 5, United States Code, Section 552, subsection (b)(7)(A), (C), (D), and (E), information is being withheld since disclosure would interfere with an ongoing enforcement proceeding, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, or disclose investigative techniques and procedures. Further, certain information is being withheld pursuant to subsection (b)(1) as the material is properly classified pursuant to Executive Order 12356.

In addition, pursuant to subsection (b)(5), Secret Service information is being withheld since it contains inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Secret Service. Other deletions have been made in accordance with subsection (b)(2) as matters relating solely to internal proceedings. The above cited exemptions are not to be construed as the only exemptions which may be applicable to these documents under the Freedom of Information Act.

I have also determined that certain information may be properly disclosed to you. The documents containing that information are enclosed with this letter.

As you have been advised by Mr. Ward, Federal Bureau of Investigation documents contained within Secret Service records were not referred since you have made a direct Freedom of Information Act request to the Bureau. However, certain Federal Bureau of Investigation information contained in Secret Service documents was forwarded to the Bureau for processing and direct release to you.

Any denial on appeal is subject to judicial review in the District Court in the district where the complainant resides, has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

For the purpose of appeals of initial denials under the Freedom of Information Act, the undersigned is the official making this determination for the United States Secret Service.

Sincerely,

William R. Barton

William R. Barton
Deputy Director

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. 20536

PLEASE ADDRESS REPLY TO

AND REFER TO THIS FILE NO.

DEC 5 1979

Mr. Francis X. Cannon
24 Wilson Avenue
Chalfont, PA 18914

Dear Mr. Cannon:

This is in response to your letter of November 12, 1979, to Acting Commissioner Crosland regarding Mr. Michael O'Rourke.

Mr. O'Rourke was brought to Service attention by another agency on October 30, 1979. His identity and Irish citizenship have been established by fingerprint comparison. Evidence has been obtained that Mr. O'Rourke has been convicted in Ireland of illegal possession of explosives for which he was sentenced to serve six years in prison. He is presently wanted by Irish authorities for escape from prison and for the subsequent murders of a British Ambassador and a police officer.

This Service, the Federal Bureau of Investigation and various local police agencies have received information from confidential sources as well as threats from anonymous callers that efforts would be made to free Mr. O'Rourke by violent means. Given Mr. O'Rourke's past history of violent escape from prison authorities in Ireland these threats could not be ignored.

This Service has an obligation, which cannot be taken lightly, to prevent the escape of persons in its custody as well as provide for the protection of its employees, media representatives and members of the public who may attend its administrative hearings.

Thank you for your interest in this matter.

Sincerely,

Glenn A. Bertness

Glenn A. Bertness
Assistant Commissioner
Investigations

Exhibit "M"

PLEASE REFER TO THIS FILE NUMBER

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ROOM 1381 — UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106

March 16, 1983

James A. Delaney
599 Spencer Lane
San Antonio, TX 78201

Dear Mr. Delaney:

Your letter to Attorney General Smith has been referred to this office for reply.

Mr. O'Rourke presently has an application to adjust his status to that of a permanent resident pending before the Board of Immigration Appeals in Washington, D.C. We are awaiting a decision from the Board at this time.

Mr. O'Rourke has been detained in the custody of this Service because the Free State Government alleges that, when Mr. O'Rourke broke out of prison in the Republic of Ireland, he killed a prison guard. That government wishes to try him for this incident..

The question of his detention has been presented to the U.S. District Court for the Southern District of New York. That court has sustained the action of this Service in detaining Mr. O'Rourke.

Sincerely,

FOR THE DISTRICT DIRECTOR

RICHARD J. SHARKEY
Chief Legal Officer

cc: AUSA
SDNY

Exhibit "N"